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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

WALT ALLEN, ET AL.,
Petitioners,

VERSUS

W. LEROY RAMPEY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals correctly follow the decision of this Court in *Perry* v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), distinguishing the decision in that case from *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), when the evidence showed that the respondents had a proper claim to their jobs and an expectation under existing rules and statutes to be re-employed?

2. Was the Court of Appeals' decision consistent with all of the issues and facts presented in the trial court?

3. Once the respondents established a *prima facie* case that they had been discharged for exercising protected First Amendment rights, while holding a form of tenure, was the burden of proof properly placed on petitioners to justify the dismissal on grounds other than First Amendment rights?

4. Was the United States Court of Appeals correctly following the decisions of this Court in *Edwards* v. *South Carolina*, 372 U.S. 229, 9 L.Ed.2d 697, 83 S.Ct. 680 (1973), and *Blackburn* v. *Alabama*, 361 U.S. 199, 4 L.Ed.2d 242, 80 S.Ct. 274 (1960), when it held that First Amendment questions of constitutional fact compel appellate *de novo* review?

5. Under Rule 52(a) of the Federal Rules for Civil Procedure, was the Court of Appeals correct when it set aside the findings of fact by the trial court as clearly erroneous?

STATEMENT OF FACTS

Only two days after 14 members of the faculty and staff (the respondents herein), including the College Dean and the Registrar, of Oklahoma College for Liberal Arts held a press conference (Vol. 3, p. 206)[1] to deplore political interference in the operation of the school with the resulting declining enrollment and academic probation, they were notified by petitioners that their contracts would not be renewed (Vol. 2, p. 71, *et. seq.*). Respondents had an

[1] The record of this case has been certified to this Court by the Clerk of the Court of Appeals. The record consists of 3 volumes. Vol. 1 includes the pleadings, Vol. 2 includes documentary evidence, and Vol. 3 oral evidence. Reference to the record include first the Volume number and then the page of the Volume.

expectation of being re-employed (Vol. 1, p. 22 and Vol. 3, p. 213) pursuant to a form of tenure plan then in effect (Vol. 1, p. 22); none had been told prior to the date of Carter's recommendation that their work was unsatisfactory, that there were extraordinary circumstances or financial requirements which prevented their being rehired, or that they would not be rehired (Vol. 1, p. 22).

Although no reason was given to the respondents for this failure to renew, the petitioner, Carter (President of OCLA and the person who made the recommendation for dismissal), was quoted in a press release from the College Office of Public Information as saying:

> "The group of 14 faculty and staff whose contracts were not renewed wrote their own conditions and the regents voted. I made my recommendations only after they called for my resignation and stated publicly that they would not work with the administration." Record, Vol. 2, p. 213. See also Vol. 2, p. 90 when he told the Regents after making recommendations for dismissal: "You've got 14 at this college that publicly have called a meeting, they have asked the media, the press to come in, and they have said, this dissident, disenchanted group. . . ."

The State educational institution at Chickasha, Oklahoma, formerly Oklahoma College for Women, 70 O.S. 1971, 1616, became an experimental liberal arts college, Oklahoma College for Liberal Arts (hereafter OCLA) in 1967. 70 O.S. 1971, 3602. Many innovative features were introduced (Vol. 2, pp. 130, 138), including a so-called "core curriculum" (Vol. 3, p. 374) in which an interdisciplinary approach to liberal arts and humanities were used rather than the traditional separate course offering (Vol. 2, pp.

136-193). Although the former faculty of OCW was rehired, most of the "core curriculum" personnel were hired new. All 11 members of the faculty whose contracts were not renewed were members of the core curriculum, several of whom the NCAA had termed "excellent teachers" (Vol. 2, p. 137), a fact which Carter acknowledged (Vol. 3, p. 376).

During the period following 1967, conflict developed at the school as the members of the old OCW faculty or traditionalist vigorously resisted the change. However, since almost all of them had tenure, removal was impossible. In fact, in establishing the new College, the Legislature had required the new Regents to "establish and maintain" a system of tenure. 70 O.S. 1971, 3606(k).

In May, 1972, the Board of Regents, upon the recommendation of the President, voted without a hearing or notice to revoke tenure. Prior to that time any faculty member who taught more than four years was assumed to have tenure (Vol. 3, pp. 61-65).

At this same meeting, May, 1972, the President of the College tendered his resignation, which was accepted, 4 to 3 (Vol. 2, p. 48).

The Regents then hired a retired former President of an obscure Oklahoma Junior College in the far Northeastern part of the State: Northern Oklahoma Junior College at Miami. At the time of his appointment, Bruce Carter was an assistant to the then Governor (since defeated) and had close relationships with two of the Regents who hired him (also two of the petitioners). One indeed had been his Dean of Women at Miami (she actually moved he be elected

President) and the other a former student (Vol. 2, p. 207, Vol. 3, p. 216).

Prior to the hiring of Carter, OCLA had been placed on Academic Probation of the North Central Accrediting Agency (NCAA) and given 18 months to make the necessary changes (Vol. 2, p. 46). To assist the College, the NCAA appointed the Chancellor of the University of Wisconsin at Milwaukee, J. Martin Klotsche (hereafter Klotsche) as special consultant (Vol. 2, pp. 46-51).

Initially, Klotsche was optimistic about the determination of Carter to correct rather than increase the conflicts at the college (Vol. 2, p. 49). By April, 1973, he became increasingly critical of Carter, saying:

> "It would have to be honestly stated that no really significant steps have been taken during the academic year to bring the institution back into some semblance of appropriate governance with the respective role of faculty, administration, and Regents clearly defined . . . in other words, almost one half of the probationary period is now behind the institution; yet little has been done thus far to rectify the major problem" (Vol. 2, pp. 52-53).

Klotsche was critical that tenure had not been reinstituted, that no grievance procedure existed, that improper external influence was being felt, that the role of the Regents had not been properly defined, and that an air of uneasiness prevailed (Vol. 2, p. 53). This he placed at the door of Carter for failing to take action as requested in his earlier reports. Klotsche also reported a substantial declining enrollment (down two thirds), and widespread stu-

dent disenchantment over the failure of the leadership to correct problems (Vol. 2, pp. 60-70).

Both Klotsche and the NCAA found the Core program to be popular and well accepted by the students (Vol. 2, p. 137). However, the popularity of the Core program caused declining enrollment in the classes of the former faculty members of OCW (Vol. 2, p. 137). Older members of the faculty, dissatisfied with Dr. Martin as President, made unilateral approaches to the Regents (Vol. 2, p. 132).

A reading of the Klotsche reports (Vol. 2, pp. 46-69) and the report of the NCAA (Vol. 2, pp. 128-43) indicates: Martin was committed to the new concept of OCLA; some of the older faculty members disagreed (Vol. 2, p. 133), saw it as a threat and attempted to circumvent Martin through contacts with the Regents. Two of the Regents resigned after pressure was applied by the Governor. Two new Regents were appointed. Martin asked the Regents to revoke tenure (an action violative of 70 O.S. 1973, 3606 (k)). The Regents did so and then accepted Martin's resignation, 4 to 3. Carter was then hired; he promptly sided with the traditionalist. He did nothing to strengthen the Core curriculum and failed to take the steps urged by Klotsche to prevent revocation of accreditation.

After Klotsche's second report was issued, the group of 14 began meeting to discuss how they could focus public attention on what they believed was the deteriorating situation at the college. They had been identified by Carter as being unfriendly to him, "divisive" holding "different philosophies" and refusing to join his favorite teacher organizations (Vol. 3, pp. 293, 355, 363, 365, 366, 369).

The 14 were principally concerned about the direction of the school (Vol. 3, pp. 217-222), the very real possibility that the school would not only lose its accreditation, but would also lose its uniqueness as a teaching institution. OCLA was more than a single school; it was a whole new and bold, some said even an exciting educational concept. With pre-enrollment down, the faculty constitution suspended, grievance procedure meaningless, a wholly inadequate library, Regents pressured to resign, tenure revoked, and loss of accreditation imminent, the 14 felt that they must act (Vol. 3, p. 221). They, like Klotsche, felt that Carter had done nothing during the school year to alleviate the situation. Indeed, they felt, he had increased the problem. Two days after commencement (so the press conference would not be disruptive), they met in Oklahoma City and released a statement.

At the trial Dr. Carter testified that he had already decided not to rehire 13 of the 14 before the press conference (Vol. 3, p. 282). He was to recommend not only that David Ward be retained, but his salary increased (Vol. 2, p. 290). When he learned that Ward was a participant in the press conference, he literally blackballed him, by drawing with dark ink a line through his name on the list of recommended personnel and inked through his increase in salary (Vol. 2, pp. 42, 45). The decision by Carter, which he said he had reached with respect to some of respondents as long as a year before in the case of Holt (Vol. 3, p. 310) and at Christmas with respect to others (Vol. 3, p. 309), was never communicated to them. This procedure is contra to the generally accepted practice of advising faculty per-

sonnel at the latest by March 1 of the school year they will not be rehired, if untenured (Vol. 2, p. 57, Vol. 3, pp. 135, 136).

The other petitioners, all members of the Regents except his assistant Feree, voted 5-2 to accept Carter's recommendations.

At the hearing Carter testified under oath that the press conference played no part in his decision, with the exception of David Ward (Vol. 3, pp. 267 to 280). He testified that he had asked a former student, Annette Black, to type up his list of recommended retentions two days before the Press Conference. Ms. Black, who worked for the Regents for Higher Education, corroborated his statement (Vol. 3, pp. 257-260). The trial court believed them both. The Court of Appeals found that even if Carter's testimony was true it was immaterial, because the reasons he dismissed the 14 constituted dismissals for exercise of first amendment protected activity during the school year before the Press Conference.

SUMMARY OF ARGUMENT

No issue of law is presented in the instant case. The question decided by the Court of Appeals was whether on the facts, the trial court was clearly erroneous in finding the respondent's conduct unprotected under the First Amendment.

This Court made clear in *Perry* v. *Sinderman*, 408 U.S. 593 (1972), that a state may not terminate the employment of a college teacher for reasons that infringe the First Amendment. That decision is simply one of a long line of

decisions of the Court holding the First Amendment applicable to the academic community. See *e.g., Sweezy* v. *New Hampshire,* 354 U.S. 234 (1957); *Shelton* v. *Tucker,* 304 U.S. 479 (1960); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *Healey* v. *James,* 408 U.S. 169 (1972); *Papish* v. *Board of Curators,* 410 U.S. 667 (1973). See generally, Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 Duke L.J. 841 (1970) and Developments in the Law—Academic Freedom, 81 Harv. L. Rev. 1045 (1968). In fact, the Court has underlined the special significance of the First Amendment in higher education. In sharp distinction to the state's reference to "*so-called* 'academic freedom' " in its Petition for Certiorari (at 18) (emphasis added), the Court has stressed that:

> "Our nation is deeply committed to safeguarding academic freedom, which is of transcendant value to us all and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . . [T]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " *Keyishian* v. *Board of Regents, supra,* at 603.

Thus, both the applicability of the First Amendment and the framework for constitutional analysis are well established. Contrary to the assertion of the state in its Petition, the Court of Appeals has not added a "new" First Amendment right. Petition at 7. The issue dealt with by the Court of Appeals in its extensive and extensively docu-

mented opinion merely concerns the applicability of the facts to established constitutional standards. Accordingly, there is no question of law requiring the Court's attention.

The trial and appellate courts did not challenge the teachers' assertion that they had an expectation of continued employment and a form of tenure. Therefore the Circuit Court properly held that the rule of *Sinderman* not *Roth* applied.

The decision of both the trial and appellate courts to consider the whole of the school year rather than a single incident was eminently correct in view of the pleadings and since no objection was made to the introduction of such evidence by the petitioners in the trial court.

Finally, the findings of the trial court were clearly erroneous, and the Court of Appeals properly applied established constitutional standards in the instant case.

ARGUMENT IN SUPPORT OF DECISION

THE UNITED STATES COURT OF APPEALS CORRECTLY INTERPRETED AND FOLLOWED CONTROLLING DECISIONS OF THIS COURT WITH RESPECT TO THE FIRST AMENDMENT RIGHTS OF TEACHERS.

This Court has unequivocally recognized that neither "students nor teachers shed their constitutional rights to freedom of speech or expression at the school house gate." *Tinker* v. *Des Moines Community School District*, 393 U.S. 503, 506, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969). The importance of respect for constitutional rights and the protection of First Amendment guarantees is especially important in the academic community. For ". . . Vigilant protection of

constitutional freedom is no where more vital than in the community of American schools." *Shelton* v. *Tucker*, 364 U.S. 479, at 487, 81 S.Ct. 247 at 251, 5 L.Ed.2d 231 (1960), Accord: *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Because the school is the market place for exchange of ideas in American society and the limitations on free speech can chill this free exchange in the schools this Court has protected within limits that right. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). Decisions of this Court and other courts recognize that freedom of speech encompasses a large number of different activities and are not "confined to verbal expression." *Brown* v. *Louisiana*, 383 U.S. 131 at 141, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966). Thus, this Court has protected the use of loud speakers, *Saia* v. *New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1947); Pamphlets, *Schneider* v. *Irvington*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); Election Day Campaigning, *Mills* v. *Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966); Picketing in a private shopping center, *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968); anti-war advertisement in school newspapers, *Zucker* v. *Paintz*, 299 F.Supp. 102 (D.C., S.D. New York, 1969).

Moreover, the applicability of the First Amendment to professionally acceptable pedagogical activity has been recognized, *Keefe* v. *Geanakos*, 418 F.2d 359 (1st Cir. 1969), *Mailloux* v. *Kiley*, 448 F.2d 1242 (1st Cir. 1971), *Parducci* v. *Rutland*, 316 F.Supp. 352 (M.D. Ala. 1970), *Sterzing* v.

Fort Bend Independent School District, 376 F.Supp. 657 (S.D. Tex. 1972) *vacated to allow reinstatement in addition to damages*, 496 F.2d 92 (5th Cir. 1974), as has its applicability to extra-mural political or other activities of teachers as citizens, *Pickering* v. *Board of Education, supra*, *Rainey* v. *Jackson State College*, 481 F.2d 347 (5th Cir. 1973) (faculty member cannot be terminated for testifying as an expert witness in an obscenity case), *Stolberg* v. *Board of Trustees*, 474 F.2d 485 (2d Cir. 1973) (faculty member cannot be non-reappointed because of his activities in opposition to the Vietnam war), and to expressions on questions intra-mural institutional policy or administration. See *e.g.*, *Smith* v. *Losee*, 485 F.2d 334 (10th Cir. 1973); *Hostrop* v. *Board of Junior College Dist. No. 515*, 471 F.2d 488 (7th Cir. 1972), *cert. den.* 411 U.S. 967 (1973); *Williams* v. *School Dist. of Springfield*, 447 S.W.2d 256 (Mo. 1969); *Winston* v. *Board of Education*, 125 N.J. Super. 131, 309 A.2d 89 (1973). As the Supreme Court of Wisconsin pointed out some time ago, "Surely a teacher in a state college is entitled to some academic freedom in criticizing school programs with which he is in disagreement." *State ex rel. Ball* v. *McPhee*, 94 N.W.2d 711, 719 (1959). See also *State ex rel. Richardson* v. *Board of Regents*, 269 P.2d 265 (Nev. 1954) and the sources cited in Finkin, Toward a Law of Academic Status, 22 Buffalo L. Rev. 575 (1973).

To be sure, the First Amendment is not an absolute. Pedagogical speech or conduct must be measured by a standard of professional responsibility. *Keefe* v. *Geanakos, supra; Mailloux* v. *Kiley, supra*. See generally, Van Alstyne, A Comment on the Specific Theory of Academic Freedom

and the General Issue of Civil Liberty, 405 THE ANNALS 140 (1972), and Nahmod, First Amendment Protection for Learning and Teaching: The Scope of Judicial Review, 18 Wayne L. Rev. 1479 (1972). Intra- and extra-mural political expression on institutional or civil matters must be weighed against the institution's need to maintain appropriate discipline for the First Amendment does not protect speech or activity which has impeded the performance of the teacher's duties or interfered with the regular operation of the school. *Pickering* v. *Board of Education, supra, Tinker* v. *Des Moines Independent Community School District, supra.* Thus, intra-mural speech or conduct which amounts to insubordination is not constitutionally protected, *Rozman* v. *Elliott,* 467 F.2d 1145 (8th Cir. 1972), *Whitsel* v. *Southeast Local School Dist.,* 484 F.2d 1222 (6th Cir. 1973), nor is the making of irresponsible remarks which are "internally destructive" of the institution's functions, *Clark* v. *Holmes,* 474 F.2d 928, 931 (7th Cir. 1973), *cert. den.* 411 U.S. 972 (1973), nor the engagement in "vitriolic and vulgar personal attacks on the administration of the university," *Bazaar* v. *Fortune,* 476 F.2d 570, n. 17 at 579 (5th Cir. 1973), *explaining Duke* v. *North Texas State University,* 69 F.2d 829 (5th Cir. 1972), *cert. den.* 413 U.S. 932 (1973).

Respondents agree with petitioner that not all speech or all forms of expression are protected. *United States* v. *O'Brian,* 391 U.S. 367, at 377, 88 S.Ct. 1673, 20 L.Ed. 672 (1968). However, *O'Brian,* cited by petitioners, is not applicable here because there is no claim that the First Amendment extends to an otherwise illegal act which is used to

dramatize an idea. Nor are we involved here with "libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime and conspiracy." *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1955).

The court below in a carefully worded opinion clearly followed this Court's ruling in *Pickering, supra*. In *Pickering* this Court, according to the Circuit Court below, held "that the review standard calls for a balancing of the teacher's interest in commenting on controversial issues against the State's interest in promoting the efficient operation of the service it performs for the public." *Rampey* v. *Allen*, 501 F.2d 1090 at 1098 (1974). Thus, the United States Court of Appeals was well acquainted with the holdings of this Court and it proceeded, consistent with other decisions of this Court, relying on the appropriate standard of review in First Amendment cases on appeal, to balance that interest. The Circuit Court reasoned that this was not a case where the Respondents were guilty of "frequent criticism and belittling of other staff members" nor was there any suggestion that these teachers had engaged in frequent disputes with superiors over course content and counseling. Indeed, as Judge Doyle wrote in the majority opinion, the evidence was all to the contrary. The 14 faculty and staff members had conducted themselves in an exemplary fashion and there simply was no evidence that anything they did was excessive or disruptive. He asserted for the majority, that the respondents "made a very substantial showing they were exercising their First Amendment rights." *Rampey, supra*, at 1098. Moreover, the

decision of the Circuit Court was consistent with its own prior holdings. In *Smith* v. *Losee, supra,* the Circuit Court held that a faculty member's rights had been violated when his contract was not renewed because of his anti-administration attitude and his outspoken criticism of and negative attitude towards the administration. As the courts below here found "the record fails to disclose that their activities (meaning the teachers) were in any way excessive or unduly burdensome to the school." *Rampey, supra,* at 1098. Instead, the majority found "In the last analysis, it was the plaintiff-appellant's refusal to conform to President Carter's patterns and molds, all of which were personal and subjective on his part, which was the cause of their being fired. Surely the right to be free from this kind of personality control is a constitutionally protected right under the First Amendment since it is a species of expression." *Rampey, supra,* 1098.

As indicated above, this Court has held that protection of the First Amendment is not limited strictly to verbal communication but includes the right to associate and the right to further "personal beliefs." *Healy* v. *James,* 408 U.S. 169 at 181, 92 S.Ct. 2338 at 2346, 33 L.Ed.2d 266 (1972).

Thus, the Circuit Court clearly followed the applicable and controlling decisions. It found (1) that the First Amendment guarantees of freedom of expression apply to untenured faculty members who have some expectation of re-employment, (2) that a faculty member could not be discharged because he exercised those protected First Amendment rights. *Perry* v. *Sinderman,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 570 (1972); (3) the court below recognized

that what was involved was essentially a balancing of interest as set forth under *Pickering, supra;* (4) on the evidence that it reviewed, it was clear that the petitioners had penalized the teachers by failing to renew their contracts because they engaged in protected First Amendment activities that were not disruptive or burdensome to the school. Therefore, the failure to renew the contracts resulted from their exercise of protected First Amendment activities.

An examination of Judge Doyle's summary of the applicable law found at 501 F.2d 1097, 1098, and 1099 shows clearly that the court below properly adopted the decisions of this Court, analyzed them correctly and applied them appropriately to the facts in this case.

Twice before this Court has specifically held "that the non-renewal of a non-tenured public school teacher's one year contract may not be predicated on his exercise of first and fourteen amendment rights. *Shelton* v. *Tucker,* supra; *Keyishian* v. *Board of Regents, supra.* We affirm those holdings here." *Perry* v. *Sinderman,* 408 U.S. 593 at 598, 33 L.Ed.2d 570 at 578, 92 S.Ct. 2694 (1972).

ARGUMENT IN ANSWER TO PETITIONERS

The petitioners rely upon three propositions for granting the writ of certiorari.

None is tenable and the argument in support of each "reason" is without substance, in view of the application of *Sinderman* and other cases, *supra.*

The Petition lacks substantial grounds. Essentially what petitioners want is for this Court to grant certiorari

to review the evidence and discuss specific facts. This the Court has made clear, it will not do. See remarks of Mr. Chief Justice Hughes at the American Law Institute Meeting (1934), 20 A.B.A.J., 341 and Mr. Chief Justice Vinson's Address to the American Bar Association, St. Louis Daily Record, September 8, 1949, p. 1, col. 7. *United States* v. *Johnston*, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1925). This is just not one of those rare cases that warrants examination by this Court of the facts because two Courts of Appeals have reached conflicting decisions with respect to the particular facts. *United States Trust Co.* v. *Commissioner*, 296 U.S. 481, 56 S.Ct. 329, 80 L.Ed. 340 (1936) or where divergent findings of fact have been made in respect of the same matter, *Dow Chemical Co.* v. *Halliburton Oil Well Cementing Co.*, 324 U.S. 320, 65 S.Ct. 647, 89 L.Ed. 973 (1945). The equal division of Judges within the Circuit (counting the District Judge within the minority of the Circuit Court) is not a grounds for granting the petition. See Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* by Richard F. Wolfson and Philip B. Kurland, 1951 Ed., §336, footnote 1.

Respondent answers the petitioners' arguments under the following heading:

A. THE COURT OF APPEALS PROPERLY FOLLOWED THE RULE OF THIS COURT IN SINDERMAN RATHER THAN ROTH, BECAUSE THE TEACHERS BELOW SHOWED THAT THE DECISION NOT TO REHIRE THEM DEPRIVED THEM OF A PROPERTY INTEREST AND CONTINUED EMPLOYMENT.

The petitioners suggest in reason 1 that the Court of Appeals "silently overruled" *Board of Regents of State Colleges* v. *Roth, supra,* by adding a "new first amendment right" which petitioners fear would bring a multitude of litigation into the federal courts on the school systems of this country. Such statements have a nostalgic pre *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 38 A.L.R.2d 1180 (1954) flavor, but that is assuredly their only distinction. Cases involving institutions of higher education in this Court are hardly new. *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L.Ed. 629 (1819)!

No new constitutional right was established by the court below. The court clearly relied upon the fact that the petitioners had discharged the respondents because they exercised their First Amendment right for freedom of speech and freedom of association. The evidence for this was proven out of the mouth of petitioner Carter not only on cross-examination but on direct examination as well.

However, petitioners misstate the holding of *Roth*. Petitioners fail to appreciate a significant difference between *Roth* and *Sinderman*. The ruling of this Court in both cases turned on the facts. The principle remains the same; a college teacher cannot be terminated because of First Amendment activity if there is a form of "defacto tenure."

As Justice Stewart explained in the *Sinderman* case, *supra*, 408 U.S. 593 at 599, "We have held today in *Board of Regents* v. *Roth* (citations omitted) that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract unless he can show that the decision not to rehire him somehow deprived him of an interest in 'liberty' *or that he had a 'property' interest in continued employment, despite the lack of tenure or a formal contract.*" (Emphasis supplied.) In *Roth* the teacher had not made a showing on either point to justify summary judgment in his favor.

In the *Sinderman* case the petitioner there had alleged a sufficient interest. In *Roth* the showing was insufficient.

Thus, the question here turns on whether there was a sufficient property interest by the teachers below to bring them within the ruling of *Sinderman*. If there was, then the decision of the Court of Appeals was correct. If there was not, then the *Roth* rule governs and the Court of Appeals' decision is wrong.

Judge Doyle clearly sets forth the facts of the case to show that the teachers' prior relationship to the college was of such a nature that they had a "property interest" in continued employment. See *Rampey, supra*, at 1093 and 1094. The Court found (1) that a form of tenure had existed at Oklahoma College for Liberal Arts prior to its being unilaterally revoked in May of 1972 by the Regents; (2) that at least one of the plaintiffs, W. Leroy Rampey, had acquired tenure prior to the revocation by the Regents; (3) that Rampey, Cherrington, Richardson and Wimbish had

completed four years at OCLA prior to the abolition of tenure and that they would be covered by the tenure provisions had it not been revoked; (4) that Pool, Holt and Maness, had completed their fourth year in May of 1972, subsequent to the abolition of the tenure; (5) as Judge Doyle recognized, "The Oklahoma statute which created the subject institution contemplated the Regents would maintain a tenure system." *Rampey, supra,* 1094. See Title 70, O.S. 1973, Sec. 3606 (k): "The Board of Regents at the Oklahoma College of Liberal Arts . . . shall have the following additional powers and duties . . . establish and maintain plans for tenure and retirement of employees at Oklahoma College of Liberal Arts . . ."

With respect to the three staff members both the District Court and the Court of Appeals recognized that administrative employees would "normally have been entitled to a hearing . . ." because of rules of the college itself. *Rampey, supra,* at 1092. The District Court, however, found that the circumstances for the hearing were not applicable. This contention was rejected by the Court of Appeals. It makes no difference which was right, because the central issue is that there was at least a property interest in the job from which the plaintiffs were discharged as required by *Sinderman.*

Therefore, the rest of argument 1 in support of the petition is inapplicable because this is not a *Roth* case, it is a *Sinderman* case for the teachers had a property interest in continued employment whereas *Roth* did not. Even the trial court recognized that there was at least a color of claim to a property interest but abstained from so holding

(Vol. 1, p. 25) "by reason of the ambiguity and lack of clarity in said State law." In his oral findings of fact the trial court said, "I have a serious question in that connection as to whether under the law the Board has got a right to take away existing achieved, accomplished tenure, and I have a further question and this is a state law question, as to whether they have a right to abolish tenure or whether they must at all times have a tenure plan. You can read the statute as requiring them to do it. As a duty to maintain a tenure plan. If it is a duty, they can't take it away. Here they have taken it away completely and haven't even replaced it with anything, even though they avow they will in the future" (Vol. 2, pp. 578-579). With respect to the three administrators the trial court said, "Now with reference to the policy on administrative personnel, I think everybody is agreed that this is not a tenure but is kin to tenure" (Vol. 3, pp. 579-580).

Therefore, even the trial court found a legitimate "property interest" in continued employment despite the lack of tenure or formal contract. Indeed, the trial court had serious reservations as to whether tenure could be revoked in light of the mandate of the legislature that the Regents establish and maintain a policy plan. However, the trial court abstained on the question of the validity of the abolition of tenure, calling it a state question (Vol. 3, p. 579).

Thus, the District Court, the majority of the Court of Appeals *en banc* and at least one of the dissenting judges (Barrett), *Rampey, supra,* at page 1113, recognized that there was some property interest in continued employment

by the plaintiffs, as outlined in *Roth*. The other two dissenting judges, Seth and Lewis, did not speak to this question in their opinions but dissented on other grounds. At the same time, however, it must be noted that they did not challenge the claim of tenure made by the teachers, recognized by the District Court, and adopted by the majority on appeal.

B. THE CIRCUIT COURT WAS CORRECT IN REVIEWING THE CONDUCT OF THE PETITIONERS TOWARDS THE TEACHERS FOR THE ENTIRE SCHOOL YEAR, RATHER THAN ISOLATE A SINGLE INCIDENT, WHEN THE COMPLAINT WAS BROADLY PHRASED, THE EVIDENCE INTRODUCED COVERED THE ENTIRE YEAR AND NO OBJECTION WAS MADE TO THE BROAD INQUIRY BY THE PETITIONERS IN THE TRIAL COURT.

Petitioners argue, "that the appellate court reversed the judgment of the trial court on grounds not pled or relied upon in the plaintiff-appellant complaint or urged or argued either at trial or before this Court on appeal." To this extent they adopt the dissenting language of Judge Barrett to the same effect (Petition, p. 20).

However, this assertion is not true for the following reasons:

1. Paragraph 13 of the Complaint reads:

> "Said conduct by defendants in terminating the plaintiffs was in violation of plaintiffs' rights under the first and fourteenth amendments to the United States Constitution in that Plaintiffs were terminated because they exercised their rights to freedom of speech and expression in criticizing defendants and disagreeing

with their policy. Said termination of Plaintiffs for these reasons is a denial of a benefit to plaintiffs in a manner which infringes upon plaintiffs' constitutional rights to free speech. Criticism of defendants' policies is an impermissible basis for termination of plaintiffs' employment under the first and fourteenth amendments" (Vol. 1, p. 4).

Although the teachers did mention the press conference and initially thought that that was the basis upon which they had been discharged, the complaint was broadly framed as indicated in paragraph 13. The press conference was merely the most obvious example of the teachers exercising their rights to freedom of speech and expression in criticizing the defendants and disagreeing with their policies.

2. As Judge Doyle noted, "The case was not tried on any narrow issue. The evidence embraced first amendment violations generally." *Rampey, supra,* at 1091. Indeed, there was no pretrial of the issues below and while the initial direct examination of the plaintiff, *Rampey,* covered the tenure question and the press conference, the examination was taken over by the District Court who ranged over the entire history of the year. At no time did any of the petitioners or their counsel (several of the petitioners are attorneys, including Walt Allen and Joel Carson) object to evidence that was being offered as to the conduct of the petitioners and the teachers throughout the school year. After the court had completed its examination, counsel for the respondents in the trial court in his cross-examination and direct examination went into matters beyond simply the press conference. Counsel for the teachers did likewise.

3. The trial judge's findings and conclusions were not restricted to the effect of the press conference on the teachers' subsequent termination of employment. For example, the trial judge specifically passed, as Judge Doyle wrote in the majority opinion, "On all other First Amendment questions, as well as the press conference, when he said: 'The court finds and concludes as a factual matter *from all the evidence and circumstances presented in this case,* that the college president did not recommend the non-renewal of the contracts of the fourteen plaintiffs as a reprisal for their exercising their first amendment rights of free speech either by reason of the press conference *or anything uttered prior thereto.*'" *Rampey, supra,* at 1092. (Emphasis added.)

In substance, the complaint filed by the teachers framed the issues for trial broadly, alleging a termination resulting from the exercise of their First Amendment rights. Although the press conference was specifically referred to, the complaint also alleges in general that the teachers were fired "because they exercised their rights to freedom of speech and expression in criticizing defendants and disagreeing with their policies." *Rampey, supra,* p. 1091.

It is well settled that civil rights complaints are to be broadly construed. Moreover, "it is immaterial whether a pleading states conclusions or facts, provided fair notice is given, and the statement of claim is short and plain. There is no requirement that federal pleadings state facts, ultimate facts, or facts sufficient to constitute a cause of action. Federal pleading is 'notice' pleading. A generalized

summary of the case that affords fair notice is all that is required." *Manual of Federal Practice* by Levine and Horning, McGraw-Hill, 1967, Sec. 3.7, p. 243. See also James, "Objective and Function of the Complaint," 14 Vand. L. Rev. 899 (1961). Thus, the complaint put the petitioners on notice that the teachers were alleging dismissal "in violation of plaintiffs' rights under the first and fourteenth amendments . . . in that plaintiffs were terminated because they exercised their rights to freedom of speech and expression in criticizing defendants and disagreeing with their policies." The complaint filed herein and which is before this Court in the certified records (Vol. 1, pp. 1-11) is plainly worded and certainly put the petitioners on notice as to what the teachers' contentions were.

C. THE TRIAL COURT'S FINDINGS WERE CLEARLY ERRONEOUS; THE COURT OF APPEALS PROPERLY APPLIED ESTABLISHED CONSTITUTIONAL STANDARDS TO THE FACTS IN THE INSTANT CASE.

The trial court concluded that the plaintiffs were dismissed by the president due to the latter's opinion that they were "divisive." The trial court held that such a consideration was not "in any way constitutionally invalid." Conclusions of Law and Findings of Fact of the trial court, Petition for Certiorari, Appendix A at vi. Similarly, the state argues that the president and Board of Regents chose to single out those on the faculty whom the president had identified as "divisive" and, even if honestly mistaken, such a consideration is constitutionally permissible so long as the *motive* for such a singling out is not a deprivation of First Amendment rights. Petition at 15-16 (emphasis in original).

Thus there is no dispute that the plaintiffs were terminated due solely to the opinion of the president that they were "divisive." Indeed the state concedes candidly that, "Critical statements plus associations were two of the methods used to identify the persons causing trouble within the College" Petition at 11.

However, contrary to the state's argument, the Court of Appeals recognized that the mere characterization of the plaintiffs as "divisive," cannot, standing alone, put an end to the inquiry. Every disagreement with an institutional administration or criticism of a policy is at least potentially "divisive." For example, association by teachers in a union is doubtless viewed as "divisive," if not downright antagonistic, by an institutional administration, but is nevertheless constitutionally protected. *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968). Equally, Marvin Pickering's letter challenging the proposed school tax was surely considered "divisive" by the school board, *Pickering* v. *Board of Education, supra,* as is any disagreement with or criticism of those in authority. The question is not whether these individuals were considered "divisive" but whether the conduct underlying that conclusion was constitutionally protected under *Pickering* and its progeny.

Accordingly the Court of Appeals pointed out, accurately, that while the trial court had concluded that these faculty members were "divisive," the trial court had failed to consider adequately whether or not their conduct, *i.e.* speech and association, giving rise to that conclusion, was protected. *Rampey, supra,* at 1096-1097. Thus the Court of Appeals was compelled to reach that fundamental issue in

order to decide whether the trial court's disposition was clearly erroneous. On the basis of the entire record, the Court of Appeals concluded that the trial court was in clear error and that the administration had, in effect, attempted to condition employment on the individual faculty member's ability to relate personally to the president and the faculty member's willingness to share the president's personal predilections, *Rampey, supra*, at 1098. That conclusion is amply supported in the record. *Id.* at 1099-1106.[2] There was, the Court of Appeals pointed out, "no evidence that the appellants constituted any threat to the operation of the College" and "not the slightest suggestion in the evidence that the plaintiffs in exercising their rights constituted any threat to the valid authority" of the president. *Rampey, supra*, at 1098. Thus the balancing required by *Pickering* must, as the Court of Appeals concluded, be struck in favor of respondents here.

The state argues, however, that the Court of Appeals has "silently" made "new" law. It suggests that differences over "philosophical concepts" between administration and faculty can supply a constitutionally permissible basis for termination (Petition at 13). The proposition is simply put too broadly. Indeed, given the extensive record below, the state's broad assertion is founded essentially on a *non-sequitur*. While conceding that the First Amendment may protect speech and association on intra-mural affairs, the

[2] Unlike *Hetrick* v. *Martin*, 480 F.2d 705 (6th Cir. 1973), there was no professional evaluation by the faculty in the discipline of whether the teaching techniques employed by the plaintiffs were in keeping with the institution's educational mission, nor was the dispute one of the academic appropriateness of the teaching techniques then being utilized by the plaintiffs.

state argues that the president of an institution may consider the frequency of faculty visits with him, his opinion on the extent to which faculty members inhabit "his world" or exhibit signs of personal "warmth," and his opinion on which faculty members associate with each other and with students, as constitutionally permissible considerations having a bearing on their extent of "philosophical agreement" with him. Obviously, since these requirements are subjective, *any* disagreement with such presidential views would be "divisive" and out of harmony with institutional policy, thereby providing a basis for termination. Hence, a faculty member's retention would be conditioned on relinquishment of his right to dissent, however respectfully, and in keeping with standards of professional propriety, on the utility of such subjective institutional policies. Thus, the state's conclusion contradicts the assertion that the First Amendment has *any* relevance to intra-mural speech and association. In essence, then, it is the state which seeks, tacitly, to change the law.

D. RULE 19 OF THIS COURT SHOULD BE APPLIED.

The Petition for Writ of Certiorari to the United States Court of Appeals for the 10th Circuit should be denied pursuant to Supreme Court Rule 19 because:

1. The Court of Appeals did not decide a federal question which had not been previously decided by this Court;

2. The decision of the Court of Appeals is in accord with the applicable decisions of this Court;

3. There are no "special or important reasons" shown by petitioners for granting certiorari in this case.

The Court of Appeals understood the distinction between *Roth* and *Sinderman*, applied that distinction to the case at hand, balanced the interests, reviewed the evidence as they should under First Amendment cases, and then reversed in light of the appropriate decisions of this Court.

CONCLUSION

In sum, the Court of Appeals merely applied well established constitutional standards in analyzing what is essentially a factual determination. It is submitted that the instant matter presents no issue warranting the attention of the Court.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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December, 1974

CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing brief was mailed this ..... day of December, 1974, postage prepaid to the Honorable Larry Derryberry, James H. Gray, Joe C Lockhart, at 112 State Capitol Building, Oklahoma City, Oklahoma, 73105 and to John R. Wallace and Robert S. Gee at P. O. Box 1168, Miami, Oklahoma, 74354.

.....

STEPHEN JONES